


# TRANSCRIPT OF RECORD

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Supreme Court of the United States


OCTOBER TERM, 1944

No. 88

  
ELLA F. FONDREN AND THE ESTATE OF W. W.  
FONDREN, DECEASED, ET AL., PETITIONERS.

vs.

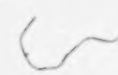
COMMISSIONER OF INTERNAL REVENUE  


ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE FIFTH CIRCUIT  


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PETITION FOR CERTIORARI FILED MAY 19, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.





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DOCKET ENTRIES.

Docket No. 107473.

ELLA F. FONDREN,

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appearances:

For Taxpayer:

W. M. Cleaves, Esq.

For Comm'r:

Wilford H. Payne, Esq.

1941

May 26—Petition received and filed.\* Taxpayer notified.

Fee paid.

May 26—Copy of petition served on General Counsel.

June 9—Request for Circuit hearing in Houston, Texas,  
filed by taxpayer. 6-9-41 Copy served.

July 14—Answer filed by General Counsel.

July 14—Request for hearing in Houston, Texas, filed by  
General Counsel.

July 21—Notice issued placing proceeding on Houston,  
Texas, calendar. Service of answer and re-  
quest made.

## 1942

- Sept. 5—Hearing set October 19, 1942—Houston, Texas.  
 Oct. 19—Hearing had before Mr. Arnold on merits. Submitted. Stipulation of facts filed. Briefs due 12-3-42. Reply 12-18-42.  
 Nov. 13—Transcript of hearing 10-19-42 filed.  
 Dec. 1—Brief filed by General Counsel.  
 Dec. 2—Brief filed by taxpayer. 12-16-42 Copy served on General Counsel.  
 Dec. 15—Reply brief filed by taxpayer. 12-16-42 Copy served on General Counsel.

## 1943

- May 4—Opinion rendered—Arnold, Judge, Div. 12. Decision will be entered for respondent. 5-4-43 Copy served.  
 May 4—Decision entered. Black, Judge, Div. 15.  
 July 30—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by taxpayer.  
 Aug. 20—Stipulation re petition for review filed by taxpayer.  
 Aug. 20—Agreed praecipe filed.  
 Sept. 1—Notice of filing petition for review filed.

## DOCKET ENTRIES.

Docket No. 107474.

ELLA F. FONDREN, Independent Executrix of the  
ESTATE OF W. W. FONDREN, Deceased,

Amended Title: ESTATE OF W. W. FONDREN, Deceased,  
Ella F. Fondren, Independent Executrix (See Order of  
6-11-41),

Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## Appearances:

For Taxpayer:

W. M. Cleaves, Esq.

For Comm'r:

Wilford H. Payne, Esq.

1941

May 26—Petition received and filed. Taxpayer notified.  
Fee paid.

May 26—Copy of petition served on General Counsel.

June 9—Request for Circuit hearing in Houston, Texas,  
filed by taxpayer.

June 9—Motion to change caption filed by taxpayer.  
6-9-41 Copy served.

June 11—Order that the caption be amended to read: "Es-  
tate of W. W. Fondren, deceased, Ella F. Fon-  
dren, Independent Executrix", entered.

July 14—Answer filed by General Counsel.

July 14—Request for hearing in Houston, Texas, filed by  
General Counsel.

July 21—Copy of answer and request served on taxpayer,  
Houston, Texas.

1942

- Sept. 5—Hearing set October 19, 1942—Houston, Texas.  
 Oct. 19—Hearing had before Mr. Arnold on merits. Submitted. Stipulation of facts filed. Briefs due 12-3-42. Reply brief 12-18-42.  
 Nov. 13—Transcript of hearing 10-19-42 filed.  
 Dec. 1—Brief filed by General Counsel.  
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 Dec. 15—Reply brief filed by taxpayer. 12-16-42 Copy served on General Counsel.

1943

- May 4—Opinion rendered—Arnold, Judge, Div. 12. Decision will be entered for respondent. 5-4-43 Copy served.  
 May 4—Decision entered. Black, Judge, Div. 15.  
 July 30—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by taxpayer.  
 Aug. 20—Stipulation re petition for review filed.  
 Aug. 20—Agreed praecipe filed.  
 Sept. 1—Notice of filing petition for review filed.

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## PETITION.

United States Board of Tax Appeals.

Filed May 26, 1941.

Ella F. Fondren, Petitioner,

vs.

Docket No. 107473

Commissioner of Internal Revenue, Respondent.

The above named Petitioner hereby petitions for a re-determination of the deficiency set forth by the Commis-

sioner of Internal Revenue in his notice of deficiency MT-ET-GT-92-37-1st Texas, Donor—Ella F. Fondren, dated March 10, 1941, and as a basis for this proceeding alleges as follows:

1. Petitioner is an individual with her principal office at 807 National Standard Building, Houston, Texas. The return for the period here involved was filed with the Collector for the 1st District of Texas at Austin, Texas.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to Petitioner on March 10, 1941.

3. The taxes in controversy are gift taxes for the calendar year 1937 and are in the amount of \$8,400.00.

4. The determination of tax set forth in notice of deficiency is based upon the following error:

The Commissioner of Internal Revenue has improperly considered certain gifts made by Petitioner during the calendar year 1937 to be gifts of "future interests"; and has therefore disallowed the \$5,000.00 annual exclusions claimed by Petitioner in connection with each of seven (7) separate gifts made by petitioner to seven (7) separate trusts respectively for the benefit of Petitioner's seven (7) grandchildren.

5. The facts upon which the Petitioner relies are as follows:

(a) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, Wash Bryan Trammell.

Jr., a full and correct copy of which written declaratory instrument is attached hereto and marked Exhibit B.

(b) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Ellanor Anne Fondren, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Ellanor Anne Fondren.

(c) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, Peter Fondren Underwood, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, Peter Fondren Underwood.

(d) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Ellanor Anne Fondren, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Ellanor Anne Fondren.

(e) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Mary Doris Fondren, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Mary Doris Fondren.

(f) Under date December 7, 1936, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, Walter William Fondren, III, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, Walter William Fondren, III.

(g) Under date December 2, 1937, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, David Milton Underwood, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, David Milton Underwood.

(h) During the calendar year 1937 and on or about December 2, 1937, Petitioner gave to each of the seven (7) trusts hereinabove particularly referred to 100 shares



of Humble Oil & Refining Company stock, the fair market value of said stock on the date of gift being \$59.75 per share so that the fair market value of the gift to each of said seven (7) trusts was \$5,975.00.

(i) In due time Petitioner prepared and filed in regular course Petitioner's gift tax return for the calendar year 1937, and in said gift tax return showed each of the above referred to gifts to the seven (7) respective trusts, and in connection with each trust claimed the statutory \$5,000.00 annual exclusion and therefore reported as to each said trust taxable gift of \$975.00 representing the difference between said annual exclusion of \$5,000.00 and the fair market value of the gift, to-wit: \$5,975.00. Petitioner then in regular course paid the gift tax on the basis of taxable gifts as so reported by her.

(j) In making her gift tax return for the calendar year 1937, Petitioner showed the "total amount of net gifts for preceding years" to be \$1,218,600.00, so that Petitioner's gift tax rate for the calendar year 1937 on the gifts as reported by her was 24%, and the gift tax was computed and paid by Petitioner on such basis.

(k) The \$8,400.00 gift tax deficiency as referred to in the Commissioner's letter of March 10, 1941, (Exhibit A) is claimed by the Commissioner to be due and payable as comprising 24% of \$35,000.00, which latter sum is the total of the seven (7) annual exclusions of \$5,000.00 each as claimed by Petitioner as hereinabove referred to.

(l) Along with his referred to letter of March 10, 1941, the Commissioner transmitted to Petitioner a "Statement" showing the basis on which the deficiency had been computed, a copy of which statement is attached hereto and marked Exhibit C.



(m) The said \$8,400.00 gift tax deficiency is claimed by the Commissioner to be due on the theory that the respective gifts hereinabove referred to, constituted in each case a gift of a future interest against which no exclusion is allowable.

(n) Petitioner claims and now alleges as a fact, that neither of said gifts as hereinabove referred to constituted a gift of future interest but did, in fact, constitute a gift of present interest; and that, therefore, the annual exclusion of \$5,000.00 is proper to be made in connection with each of said gifts; and that Petitioner properly deducted said annual exclusion from each of said gifts and that only the remainder of each of said gifts, to-wit: \$975.00, is to be considered in computing Petitioner's 1937 gift tax; and that in view of the fact that Petitioner has heretofore duly and properly paid gift tax on all said gifts in excess of said \$5,000.00 annual exclusions, there is no legal basis for any part of said \$8,400.00 deficiency.

Wherefore your Petitioner prays that this Board may hear this proceeding; and that upon such hearing, this Board enter its judgment decreeing that each and all of the gifts hereinabove referred to were in fact and in law, gifts of present interests and not gifts of future interests; and that as to each of said gifts made to each of said respective trusts, Petitioner was and still is entitled to the statutory \$5,000.00 annual exclusion; and that said \$8,400.00 gift tax deficiency and each and every part thereof is improper and illegal; and ordering and requiring that said Commissioner refrain and desist henceforth from alleging any such deficiency and from assessing and collecting any tax on account thereof.

W. M. CLEAVES,

Attorney for Petitioner, Ella  
F. Fondren.

806 National Standard Bldg.,  
Houston, Texas.

State of Texas,  
County of Harris.

Ella F. Fondren, being duly sworn, says that she is the petitioner above named; and that she has read the foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true.

ELLA F. FONDREN.

Subscribed and sworn to by Ella F. Fondren before me this the 28th day of April, 1941.

W. O. MANNING,

(Seal)

Notary Public in and for  
Harris County, Texas.

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EXHIBIT A.

Treasury Department,  
Washington.

March 10, 1941.

MT-ET-GT-92-37-1st Texas.

Donor—Ella F. Fondren.

Mrs. Ella F. Fondren,  
807 National Standard Building,  
Houston, Texas.

Madam:

You are advised that the determination of your gift tax liability for the calendar year 1937 discloses a deficiency of \$8,400.00 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the inclosed form and forward it to this office. The signing and filing of these forms will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By D. S. BLISS,

(D. S. Bliss)

Deputy Commissioner.

Inclosure—11229.

For EXHIBIT "B" referred to in paragraph 5 of Petition see EXHIBIT 1-D, Page 51.

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EXHIBIT C.

MT-ET-GT-92-1st Texas.

Donor—Ella F. Fondren.

Calendar year—1937.

Statement.

The deficiency is computed as follows:

	Returned	Determined
Total gifts, 1937, other than charitable, public and similar gifts .....	\$ 59,750.00	\$ 59,750.00
Less exclusions .....	50,000.00	15,000.00
Amount of gifts included...	9,750.00	44,750.00
Less specific exemption ....	0.00	0.00
Net gifts, 1937 .....	9,750.00	44,750.00
Net gifts for preceding years	1,218,600.00	1,263,600.00*
Total net gifts .....	1,228,350.00	1,308,350.00
Tax on total net gifts .....	221,754.00	240,954.00
Tax on net gifts for preceding years .....	219,414.00	230,214.00
Tax on net gifts, 1937 .....	2,340.00	10,740.00
Tax shown on return .....		2,340.00
Deficiency, 1937 .....		8,400.00

\*Explained below.

The deficiency results from the following adjustment:

Schedule A	Returned	Determined
Exclusions .....	\$ 50,000.00	\$ 15,000.00

Three exclusions of \$5,000.00 each are allowed with respect to the direct gifts to your children.

As it is provided in each of the trust instruments by which the trusts for the benefit of your grandchildren were created that the income or corpus shall be used only if necessary for the support, maintenance and education of

the beneficiary, it is held that the beneficiaries did not receive the immediate right to the unrestricted use, possession or enjoyment of the income or corpus. Accordingly, the gifts are gifts of future interests against which no exclusions are allowable.

The adjustment in net gifts for preceding years shown above, which does not affect your gift tax liability for this calendar year, results from the fact that you claimed exclusions in the amount of \$30,000.00 for the calendar year 1935 and \$45,000.00 for the calendar year 1936, whereas only three donees received gifts other than gifts of future interests in each of those years. Accordingly, \$45,000.00, the excess of the amount claimed over the amount allowable, has been added to the amount shown as net gifts for preceding years shown on the return.

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## ANSWER.

Received Jul. 14, 1941.

Filed Jul. 14, 1941.

United States Board of Tax Appeals.

Ella F. Fondren, Petitioner,

vs.

Docket No. 107473.

Commissioner of Internal Revenue, Respondent.

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

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1.

Admits the allegations contained in paragraph 1 of the petition.

2.

Admits that the notice of deficiency was mailed to petitioner on March 10, 1941. It is also admitted that a copy of said letter, without the accompanying statement, is attached to the petition herein and marked Exhibit A.

3.

Admits the allegations contained in paragraph 3 of the petition.

4.

Denies that in determining the deficiency asserted herein the Commissioner committed error as alleged in paragraph 4 of the petition.

5.

(a-g) Admits that prior to the close of the taxable year 1937 petitioner, Ella F. Fondren, and her husband, W. W. Fondren, now deceased, as grantors, established seven trusts, one each naming one of their seven grandchildren as a beneficiary. Denies each and every other allegation contained in subparagraphs (a) to (g), inclusive, of paragraph 5 of the petition.

(h) Admits that during the calendar year 1937, Petitioner made gifts in trust to each of the seven trusts, for the uses and purposes designated in the respective trust in-

struments, of 100<sup>3</sup> shares of Humble Oil & Refining Company stock, the fair market value of said stock on the date of gift being \$59.75 per share, so that the fair market value of the gift in trust to each of said trusts was \$5,975.00.

(i) Admits that petitioner prepared and filed a gift tax return for the calendar year 1937 and in said gift tax return showed each of the above referred to gifts to the seven respective trusts, and in connection with the gift to each trust claimed a \$5,000.00 exclusion, and therefore reported as to each gift \$975.00, representing the difference between the exclusion of \$5,000.00 and the fair market value of the gift, to-wit: \$5,975.00. Denies the remaining allegation contained in subparagraph (i) of paragraph 5 of the petition.

(j) Admits that in making her gift tax return for the calendar year 1937 petitioner showed the total amount of net gifts for preceding years to be \$1,218,600.00. Denies the remaining allegations contained in subparagraph (j) of paragraph 5 of the petition.

(k) Admits that in the Commissioner's deficiency notice (Exhibit A to the petition herein) a deficiency in gift tax in the amount of \$8,400.00 was determined to be due and payable from the petitioner for the taxable year 1937. Denies the remaining allegations contained in subparagraph (k) of paragraph 5 of the petition.

(l) Admits the allegations contained in subparagraph (l) of paragraph 5 of the petition.

(m) Admits the allegations contained in subparagraph (m) of paragraph 5 of the petition.

(n) Denies each and every allegation contained in subparagraph (n) of paragraph 5 of the petition.



Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL, FBS

(J. P. Wenchel)

Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

JAMES L. BACKSTROM,

Division Counsel,

WILFORD H. PAYNE,

Special Attorney,

Bureau of Internal Revenue.

WHP:mjh 7-9-41

# PETITION.

United States Board of Tax Appeals.

Filed May 26, 1941.

Ella F. Fondren, Independent Executrix of the Estate of  
W. W. Fondren, Deceased, Petitioner.

vs.

Docket No. 107474.

Commissioner of Internal Revenue, Respondent.

The above named Petitioner hereby petitions for a re-determination of the deficiency set forth by the Commis-



sioner of Internal Revenue in his notice of deficiency MT-ET-GT-45-37-1st Texas, Donor—W. W. Fondren (deceased), dated March 10, 1941, and as a basis for this proceeding alleges as follows:

1. Petitioner is now the duly and legally qualified Independent Executrix of the Estate of W. W. Fondren, deceased, with her principal office at 807 National Standard Building, Houston, Texas. The return for the period here involved was filed with the Collector for the 1st District of Texas at Austin, Texas.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to Petitioner on March 10, 1941.

3. The taxes in controversy are gift taxes for the calendar year 1937 and are in the amount of \$8,400.00.

4. The determination of tax set forth in notice of deficiency is based upon the following error:

The Commissioner of Internal Revenue has improperly considered certain gifts made by W. W. Fondren during the calendar year 1937 to be gifts of "future interests"; and has therefore disallowed the \$5,000.00 annual exclusions claimed by Petitioner in connection with each of seven (7) separate gifts made by W. W. Fondren to seven (7) separate trusts respectively for the benefit of said W. W. Fondren's seven (7) grandchildren.

5. The facts upon which the Petitioner relies are as follows:

(a) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instru-

ment as Grantors made, established, published, and declared a trust for their Grandson, Wash Bryan Trammell, Jr., a full and correct copy of which written declaratory instrument is attached hereto and marked Exhibit B.

(b) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Sue Trammell, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Sue Trammell.

(c) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, Peter Fondren Underwood, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, Peter Fondren Underwood.

(d) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Ellanor Anne Fondren, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Ella Anne Fondren.

(e) Under date December 17, 1935, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Granddaughter, Mary Doris Fondren, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Granddaughter, Mary Doris Fondren.

(f) Under date December 7, 1936, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, Walter William Fondren, III, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, Walter William Fondren, III.

(g) Under date December 2, 1937, W. W. Fondren and wife, Ella F. Fondren, by formal written declaratory instrument as Grantors made, established, published, and declared a trust for their Grandson, David Milton Underwood, and which written declaratory instrument for all purposes of this protest, is of substantially same effect as said Exhibit B above referred to, saving and excepting only that the specific beneficiary named therein in lieu of being their Grandson, Wash Bryan Trammell, Jr., is Grantors' Grandson, David Milton Underwood.

(h) During the calendar year 1937 and on or about December 2, 1937, W. W. Fondren gave to each of the seven (7) trusts hereinabove particularly referred to 100 shares

of Humble Oil & Refining Company stock, the fair market value of said stock on the date of gift being \$59.75 per share so that the fair market value of the gift to each of said seven (7) trusts was \$5,975.00.

(i) In due time W. W. Fondren prepared and filed in regular course W. W. Fondren's gift tax return for the calendar year 1937, and in said gift tax return showed each of the above referred to gifts to the seven (7) respective trusts, and in connection with each trust claimed the statutory \$5,000.00 annual exclusion and therefore reported as to each said trust taxable gift of \$975.00 representing the difference between said annual exclusion of \$5,000.00 and the fair market value of the gift, to-wit: \$5,975.00. W. W. Fondren then in regular course paid the gift tax on the basis of taxable gifts as so reported by him.

(j) In making his gift tax return for the calendar year 1937, W. W. Fondren showed the "total amount of net gifts for preceding years" to be \$1,234,847.50, so that W. W. Fondren's gift tax rate for the calendar year 1937 on the gifts as reported by him was 24%, and the gift tax was computed and paid by W. W. Fondren on such basis.

(k) The \$8,400.00 gift tax deficiency as referred to in the Commissioner's letter of March 10, 1941, (Exhibit A) is claimed by the Commissioner to be due and payable as comprising 24% of \$35,000.00, which latter sum is the total of the seven (7) annual exclusions of \$5,000.00 each as claimed by W. W. Fondren as hereinabove referred to.

(l) Along with his referred to letter of March 10, 1941, the Commissioner transmitted to Petitioner a "Statement" showing the basis on which the deficiency had been computed, a copy of which statement is attached hereto and marked Exhibit C.

(m) The said \$8,400.00 gift tax deficiency is claimed by the Commissioner to be due on the theory that the respec-

tive gifts hereinabove referred to, constituted in each case a gift of a future interest against which no exclusion is allowable.

(n) Petitioner claims and now alleges as a fact, that neither of said gifts as hereinabove referred to constituted a gift of future interest but did, in fact, constitute a gift of present interest; and that, therefore, the annual exclusion of \$5,000.00 is proper to be made in connection with each of said gifts; and that W. W. Fondren properly deducted said annual exclusion from each of said gifts and that only the remainder of each of said gifts, to-wit: \$975.00, is to be considered in computing W. W. Fondren's 1937 gift tax; and that in view of the fact that W. W. Fondren has heretofore duly and properly paid gift tax on all said gifts in excess of said \$5,000.00 annual exclusions, there is no legal basis for any part of said \$8,400.00 deficiency.

Wherefore your Petitioner prays that this Board may hear this proceeding; and that upon such hearing, this Board enter its judgment decreeing that each and all of the gifts hereinabove referred to were in fact and in law, gifts of present interests and not gifts of future interests; and that as to each of said gifts made to each of said respective trusts, W. W. Fondren and Petitioner was and still are entitled to the statutory \$5,000.00 annual exclusion; and that said \$8,400.00 gift tax deficiency and each and every part thereof is improper and illegal; and ordering and requiring that said Commissioner refrain and desist henceforth from alleging any such deficiency and from assessing and collecting any tax on account thereof.

W. M. CLEAVES.

Attorney for Petitioner, Ella  
F. Fondren, Independent Ex-  
ecutrix of the Estate of W.  
W. Fondren, Deceased.

306 National Standard Bldg.,  
Houston, Texas.

State of Texas,  
County of Harris.

Ella F. Fondren, being duly sworn, says that she is the petitioner above named; and that she has read the foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true.

ELLA F. FONDREN.

Subscribed and sworn to by Ella F. Fondren before me this the 28th day of April, 1941.

W. O. MANNING,

(Seal)

Notary Public in and for  
Harris County, Texas.

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## EXHIBIT A.

Treasury Department,  
Washington.

March 10, 1941.

MT-ET-GT-45-37-1st Texas.

Donor—W. W. Fondren (Deceased).

Ella F. Fondren, Executrix,  
807 National Standard Building,  
Houston, Texas.

Madam:

You are advised that the determination of the gift tax liability of the above-named deceased donor for the calendar year 1937 discloses a deficiency of \$8,400, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.



Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the inclosed form and forward it to this office. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By D. S. BLISS,

(D. S. Bliss)

Deputy Commissioner.

Inclosure—11230.

For EXHIBIT "B" referred to in paragraph 5 of Petition see EXHIBIT 1-D, Page 51.

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EXHIBIT C.

MT-ET-GT-45-1st Texas.

Donor--W. W. Fondren (Deceased).

Calendar year—1937.

Statement.

The deficiency is computed as follows:

	Returned	Determined
Total gifts, 1937, other than charitable, public and similar gifts .....	\$ 59,750.00	\$ 59,750.00
Less exclusions .....	50,000.00	15,000.00
Amount of gifts included...	9,750.00	44,750.00
Less specific exemption ....	0.00	0.00
Net gifts, 1937 .....	9,750.00	44,750.00
Net gifts for preceding years	1,234,847.50	1,284,847.50*
Total net gifts .....	1,244,597.50	1,329,597.50
Tax on total net gifts .....	225,653.40	246,053.40
Tax on net gifts for preceding years .....	223,313.40	235,313.40
Tax on net gifts, 1937 .....	2,340.00	10,740.00
Tax shown on return .....		2,340.00
Deficiency, 1937 .....		8,400.00

\*Explained below.

The deficiency results from the following adjustments:

Schedule A	Returned	Determined
Exclusions .....	\$ 50,000.00	\$ 15,000.00

Three exclusions of \$5,000.00 each are allowed with respect to the direct gifts to the donor's children.

As it is provided in each of the trust instruments by which the trusts for the benefit of the donor's grandchildren were created that the income or corpus shall be used only if necessary for the support, maintenance and educa-



tion of the beneficiary, it is held that the beneficiaries did not receive the immediate right to the unrestricted use, possession or enjoyment of the income or corpus. Accordingly, the gifts are gifts of future interests against which no exclusions are allowable.

The adjustment in net gifts for preceding years shown above, which does not affect the donor's gift tax liability for this calendar year, results from the fact that the donor claimed exclusions in the amount of \$35,000.00 for the calendar year 1935 and \$45,000.00 for the calendar year 1936, whereas only three donees received gifts other than gifts of future interests in each of those years. Accordingly, \$50,000.00, the excess of the amount claimed over the amount allowable, has been added to the amount shown as net gifts for preceding years shown on the return.

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## ANSWER.

Received Jul. 14, 1941.

Filed Jul. 14, 1941.

United States Board of Tax Appeals.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner,

vs.

Docket No. 107,474.

Commissioner of Internal Revenue, Respondent.

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1.

Admits that Ella F. Fondren is the Executrix of the Estate of W. W. Fondren, deceased, with her principal office at 807 National Standard Building, Houston, Texas. It is also admitted that the return for the period here involved was filed with the Collector of Internal Revenue for the 1st District of Texas at Austin, Texas.

2.

Admits that the notice of deficiency was mailed to petitioner on March 10, 1941. It is also admitted that a copy of said letter, without the accompanying statement, is attached to the petition herein and marked Exhibit A.

3.

Admits the allegations contained in paragraph 3 of the petition.

4.

Denies that in determining the deficiency asserted herein the Commissioner committed error as alleged in paragraph 4 of the petition.

5.

(a-g) Admits that prior to the close of the taxable year 1937, W. W. Fondren, now deceased, and his wife, Ella F. Fondren, as grantors, established seven trusts, one each naming one of their seven grandchildren as a beneficiary. Denies each and every other allegation contained in subparagraphs (a) to (g), inclusive, of paragraph 5 of the petition.

(h) Admits that during the calendar year 1937 W. W. Fondren made gifts in trust to each of the seven trusts, for the uses and purposes designated in the respective trust instruments, of 100 shares of Humble Oil & Refining Company stock, the fair market value of said stock on the date of gift being \$59.75 per share, so that the fair market value of the gift in trust to each of said trusts was \$5,975.00.

(i) Admits that W. W. Fondren prepared and filed a gift tax return for the calendar year 1937 and in said gift tax return shown each of the above referred to gifts to the seven respective trusts, and in connection with the gift to each trust claimed a \$5,000.00 exclusion, and therefore reported as to each gift \$975.00, representing the difference between the exclusion of \$5,000.00 and the fair market value of the gift, to-wit: \$5,975.00. Denies the remaining allegation contained in subparagraph (i) of paragraph 5 of the petition.

(j) Admits that in making his gift tax return for the calendar year 1937 W. W. Fondren showed the total amount of net gifts for preceding years to be \$1,234,847.50. Denies the remaining allegations contained in subparagraph (j) of paragraph 5 of the petition.

(k) Admits that in the Commissioner's deficiency notice (Exhibit A to the petition herein) a deficiency in gift tax in the amount of \$8,400.00 was determined to be due and payable from the petitioner for the taxable year 1937. Denies the remaining allegations contained in subparagraph (k) of paragraph 5 of the petition.

(l) Admits the allegations contained in subparagraph (l) of paragraph 5 of the petition.

(m) Admits the allegations contained in subparagraph (m) of paragraph 5 of the petition.

(n) Denies each and every allegation contained in subparagraph (n) of paragraph 5 of the petition.

6.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL, FBS

(J. P. Wenchel)

Chief Counsel, Bureau of  
Internal Revenue.

Of Counsel:

JAMES L. BACKSTROM,

Division Counsel,

WILFORD H. PAYNE,

Special Attorney,

Bureau of Internal Revenue.

WHP:mjh 7-9-41

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The Tax Court of the United States.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner.

vs.

Commissioner of Internal Revenue, Respondent.

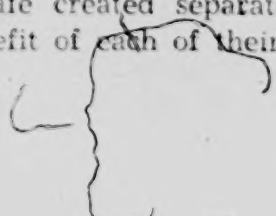
Ella F. Fondren, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

Docket Nos. 107473, 107474. Promulgated May 4, 1943.

W. W. Fondren and wife created separate irrevocable trusts for the benefit of each of their seven



minor grandchildren. Each trust instrument provided that the trust income, and thereafter trust corpus, if it be necessary, should be used for the proper maintenance, support, and education of each grandchild. If the trust income was not needed for these purposes it was to be accumulated and added to corpus and distributed in stated percentages upon each beneficiary arriving at the age of 25, 30, and 35, with remainder over in case of death. *Held*, as the obligation to support the beneficiaries rested on the parents, who were able to and did support them, and as the gifts to the beneficiaries were dependent on survivorship and were limited by the discretionary power vested in the trustee, the gifts in trust were of future and not present interests.

*William M. Cleaves, Esq.*, for the Petitioners.

*Wilford H. Payne, Esq.*, for the Respondent.

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## OPINION.

*ARNOLD, Judge:*

These proceedings, consolidated for decision, involve gift tax deficiencies for 1937 of \$8,400 each. The sole issue is whether gifts in trust were gifts of future interests, thereby prohibiting any \$5,000 exclusion. The cases were submitted upon stipulated facts and exhibits. The stipulated facts are adopted as our findings of fact and the material portions are hereinafter set forth.

During the taxable year, and prior and subsequent thereto, Ella F. Fondren and W. W. Fondren were husband and wife, residing and domiciled in Texas. W. W. Fondren died intestate January 5, 1939. Ella F. Fondren is the duly appointed executrix of his estate, with offices in Houston, Texas. The gift tax returns of husband and wife were filed with the collector of internal revenue for the first district of Texas.

On December 17, 1935, W. W. Fondren and Ella F. Fondren executed a separate trust instrument in favor of each of their five grandchildren, namely, Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., and Sue Fondren Trammell. At that time the eldest grandchild was less than six years of age. On December 7, 1936, decedent and his wife executed a trust instrument in favor of a sixth grandchild, Walter William Fondren III, born April 29, 1936. On December 2, 1937, they executed a seventh trust instrument in favor of David Milton Underwood, a grandchild born March 5, 1937. The provisions of the various trust instruments were substantially the same, so that the specific provisions of the first instrument hereinafter set forth are illustrative of the provisions of each indenture. The principal variation in the trust provisions were with respect to the successor beneficiaries in the event of the death of the principal beneficiary, all of whom were living when this proceeding was heard.

Each trust instrument constituted W. W. Fondren, trustee, and upon his death or resignation Ella F. Fondren was to succeed to the trusteeship. Each trust instrument expressly provided that W. W. Fondren and/or Ella F. Fondren might transfer, assign, and deliver additional property to the trustee for the benefit of the particular beneficiary. Upon the death of W. W. Fondren on January 5, 1939, Ella F. Fondren succeeded to the trusteeship and has since administered each trust as trustee.

The Trustee was given full power and authority with respect to the management, control and handling of the trust property. He could sell, mortgage, pledge, encumber or otherwise dispose of the same, and invest, reinvest, and keep invested all proceeds from earnings or sales so as to make the trust estate earn the best income consistent with safety of investment and sound business principles. Sales could be made in lots, parcels, or the entirety for such price



and purposes and under such terms and conditions as in the trustee's judgment was for the best interests of the trust estate. The trustee could institute, prosecute, maintain, and defend any suits, actions, or legal proceedings necessary in his judgment for the protection or enforcement of the interests of the trust estate. He could employ at the expense of the trust estate such accountants, agents, and attorneys as in his judgment were for the best interests of the trust estate. The exercise of any power conferred on the trustee was not to exhaust the power, but said power could be exercised as often as and whenever in the judgment of the trustee such exercise thereof was necessary or advisable for the best interests of the trust estate.

Article three of the trust instruments reads in part as follows:

#### Article Three.

Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors, by either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, [or Granddaughter as the case may be] using only the income of said estate for that purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.

It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby cre-

ated to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this Trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.

\* \* \* \* \*

The trusts were to continue until each grandchild attained the age of 35, but 25 per cent of the corpus and accumulations, if any, were to be delivered to the grandchild when he or she attained the age of 25, 33-1/3 per cent when he or she attained age 30, and the remainder when he or she attained age 35. If the beneficiary died leaving issue before termination of the trust, the trust estate was to be held and administered for the benefit of the issue and delivered share and share alike when the youngest of such issue attained age 21. If the beneficiary died without issue before termination of the trust, successor beneficiaries were provided for by the trust instruments, or the trust estate descended to the heirs under the laws of the State of Texas.

The stated purpose in creating the trust was "to provide for the personal comfort, support, maintenance and welfare of" each grandchild. The trust fund was not to be liable for obligations of the beneficiary. The beneficiary could



not anticipate his or her interest in the trust fund, and the fund could not be reached by judgment creditors or others having claim against any beneficiary. Other provisions common to trust indentures were included in the instruments, but such provisions are not deemed pertinent to the issue and are not set forth.

The trusts were absolute and irrevocable, with no interest in the estate or the benefits accruing therefrom received or retained by the grantors. The grantors reserved the right, however, to remove any acting trustee, except W. W. Fondren, and to name and appoint a successor trustee with the same rights, powers, and authority as the first trustee, a right which was also reserved to the survivor of the grantors.

On or about December 2, 1937, W. W. Fondren and Ella F. Fondren each gave to the trustee for each of the seven trusts aforementioned 100 shares of Humble Oil & Refining Co. stock. The gifts to the trust for David Milton Underwood were the first gifts to this trust. The gifts to the other trusts were in augmentation of the trust estates theretofore existing. The fair market value of the Humble Oil & Refining Co. stock on December 2, 1937, was \$59.75 per share.

On their gift tax returns for 1937 W. W. Fondren and Ella F. Fondren each claimed the statutory exclusion of \$5,000 and each reported a taxable gift to each of said trusts of \$975. Each paid gift taxes on the basis of the taxable gifts so reported.

In addition to the seven gifts in trust for the benefit of their grandchildren, W. W. Fondren and Ella F. Fondren each made direct gifts of Humble Oil & Refining Co. stock during 1937 to their three children as follows: Walter W. Fondren, Jr., 100 shares; Catherine Fondren Underwood, 100 shares; and Susie Fondren Trammell, 100 shares. At the date of each of said gifts the fair market value of said stock was \$59.75 per share. In their gift tax returns W. W.

Fondren and Ella F. Fondren each claimed a \$5,000 exclusion with respect to each gift to their children, or a total exclusion for each of \$15,000.

At all times subsequent to the creation of the aforementioned trusts the parents of the beneficiaries named therein have adequately and sufficiently provided for the proper and adequate support, maintenance and education of their children, with the result that no part of the trust income or corpus has been distributed, used, or applied to or for the benefit, support, maintenance, or education of any one of said beneficiaries.

In determining the deficiencies involved herein respondent allowed W. W. Fondren and Ella F. Fondren three \$5,000 exclusions each with respect to the direct gifts made during 1937 to their children and disallowed to each seven \$5,000 exclusions because of the gifts in trust for the benefit of their grandchildren. The disallowance in each instance was based upon respondent's determination that the gifts in trust constituted gifts of future interest in property against which no exclusions are allowable.

The gifts in trust made by W. W. Fondren and Ella F. Fondren for the benefit of their grandchildren in 1937 were gifts of future interests in property as to which no \$5,000 exclusions are allowable in determining their gift tax liability for 1937.

Section 504 (b) of the Revenue Act of 1932 provides that the first \$5,000 of gifts made to any person by the donor (other than gifts of future interests in property) shall not be included in the total amount of gifts made during such year. "Future interests" under article 11 of Regulations 79 (1936 Ed.) include "reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time". This regulation has been considered and approved by the Courts in a number of cases, *United States v. Pelzer*, 312 U. S. 399; *Ryerson v.*

*United States*, 312 U. S. 405; *Helvering v. Hutchings*, 312 U. S. 393; *Mary M. Hutchings*, 1 T. C. 692, and cases cited therein.

The Courts have decided numerous cases involving gifts in trust where the character of the gift, i. e., present or future, depended upon the amount of discretion lodged in the trustee to make distributions of trust income or corpus to the trust beneficiaries. Cf. *Smith v. Commissioner* (C. C. A., 8th Cir.), 131 Fed. (2d) 254, with *Welch v. Paine* (C. C. A., 1st Cir.), 130 Fed. (2d) 990. The latter case stated the rule, based on authorities therein cited, to be that if the right of the beneficiary to the use, possession, and enjoyment of the trust income or corpus is subject to the discretion of the trustee, the gift is a gift of a future and not a present interest. To the same effect is our decision in *Winston Paul*, 46 B. T. A. 920, where the net income of the trust was distributable "in such proportion as the trustee may in his absolute discretion determine"; in *Lillian Seeligs Winterbotham*, 46 B. T. A. 972, where the net income was distributable in such proportions as to the trustees "shall seem fit and proper \* \* \* (such portion to be determined solely in the judgment and discretion of the said Trustees, and without any control over them in the exercise of such judgment or discretion) \* \* \*"; and in *Mary M. Hutchings, supra*, where income could be accumulated or distributed in the "sole and absolute discretion" of the trustees. In each of these cases we held that the discretion lodged in the trustee so postponed the use, possession, and enjoyment of the income or corpus by the beneficiary that the gift was a gift of a future and not a present interest.

We think the situation here with respect to the discretion lodged in the trustee is much the same. While the draftsman of the several trust instruments failed to use the word "discretion" in describing the power and authority lodged in the trustee, such phrases as "in the judgment of the Trustee", "for the best interests of said trust estate", and "if it be necessary", which recur frequently in each instru-

ment, adequately vest the trustee with discretionary power and authority. It was the express duty of the trustee to see that the grandchildren were properly maintained, educated, and supported. In the discharge of that duty he could use trust income first and, if it be necessary, all the corpus. Performance of this duty required the exercise of discretion, whether so called in the trust instrument or not.

Furthermore, the grantors definitely contemplated that neither income nor corpus would be needed for the maintenance, support, and education of the grandchildren. It is stipulated that the parents of the grandchildren provided adequately for each and all of said children. It is apparent from this fact, and from the several trust instruments themselves, that the dominant purpose of the grantors was not so much the present giving to their grandchildren as it was the creation of a trust estate which would be partially distributed if, when, and as they attained the ages of 25, 30, and 35, respectively. Each trust instrument stated specifically that the grantors contemplated that the beneficiary named therein "will have other adequate and sufficient means of support", so that it would not be necessary to use net income or corpus, but income could be accumulated and added to corpus. The earnest hope was expressed that all earnings and income of the trust estate would be used to augment the trust estate and later distributed as a part of corpus. The trust income and corpus was a reserve which would provide for the grandchildren if necessary. The intent of the grantors, coupled with the legal obligation imposed on parents to support their children, leads us to the conclusion that the effect of the instruments was to postpone the gifts until the grandchildren achieved specified ages. Obviously, the right to possession, use, and enjoyment of the trust corpus was dependent upon survivorship. If so dependent, the gift is a gift of future interest. *Fisher v. Commissioner* (C. C. A., 9th Cir.), 132 Fed. (2d) 383.

*Decision will be entered for the respondent.*

(Seal)

(Copy)\*

## DECISION.

The Tax Court of the United States,  
Washington.

Ella F. Fondren, Petitioner,  
vs. Docket No. 107473.  
Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated May 4, 1943, it is

Ordered and Decided: That there is a deficiency in gift tax of \$8,400 for the year 1937.

(S.) EUGENE BLACK,  
Judge.

Enter: Entered: May 4, 1943.

—  
(Copy)

## DECISION.

The Tax Court of the United States,  
Washington.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner,

vs. Docket No. 107474.  
Commissioner of Internal Revenue, Respondent.

Pursuant to the determination of the Court, as set forth in its Opinion, promulgated May 4, 1943, it is

Ordered and Decided: That there is a deficiency in gift tax of \$8,400 for the year 1937.

(S.) EUGENE BLACK,  
Judge.

Enter: Entered: May 4, 1943.

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PETITION FOR REVIEW.

Filed July 30, 1943.

United States Circuit Court of Appeals for the Fifth  
Circuit.

The Tax Court of the United States.

Ella F. Fondren, Petitioner in Review,

vs.

Docket No. 107473.

Commissioner of Internal Revenue, Respondent in  
Review.

and

The Tax Court of the United States.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Inde-  
pendent Executrix, Petitioner in Review,

vs.

Docket No. 107474.

Commissioner of Internal Revenue, Respondent in  
Review.



Now come Ella F. Fondren and the Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, respectively, original petitioners and now petitioners for review in the above styled and numbered causes and file this their petition for review of the consolidated decision of The Tax Court of the United States as rendered by said The Tax Court of United States on May 4, 1943.

## I.

### Brief Statement of Nature of Controversy.

The above causes involve United States gift tax deficiencies alleged by Respondent in Review to be owing by W. W. Fondren (now the Estate of W. W. Fondren) and wife, Ella F. Fondren, for the calendar year 1937.

The question is whether or not gifts made in trust by said W. W. Fondren and Ella F. Fondren during the calendar year 1937 were gifts of future interests so as to deny their exclusions in computing net taxable gifts of the donors for such taxable year.

Hearing was had in Houston, Texas, on October 19, 1942, and by reason of the fact that the issues involved in the two causes were substantially identical, The Tax Court of the United States, on motion of both parties, consolidated the two causes.

## II.

### Declaration of Court in Which Review is Sought.

Petitioners in Review hereby declare United States Circuit Court of Appeals for the Fifth Circuit to be the Court in which review is sought.



## III.

## Assignment of Error.

The Tax Court of the United States erred in holding that each of the several gifts involved in these causes were gifts of future interests and therefore improper to be excluded in computing net taxable gifts for the calendar year 1937.

## IV.

## Prayer.

Petitioners in Review file this their petition and ask that said decision of The Tax Court of the United States in these consolidated causes be reviewed and that upon said review said decision be reversed and decree rendered herein; adjudging and decreeing that each of the several gifts involved in these causes were gifts of present interests and therefore proper to be excluded in computing net taxable gifts of W. W. Fondren and Ella F. Fondren for the calendar year 1937, to the extent of \$5,000.00 of each such gift.

W. M. CLEAVES,

Attorney for Petitioner in Review, Ella F. Fondren, in  
Docket No. 107473.

806 National Standard Building,  
Houston 2, Texas.

W. M. CLEAVES,

Attorney for Petitioner in Review, Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, in Docket No. 107474.

806 National Standard Building,  
Houston 2, Texas.

State of Texas,  
County of Harris.

Ella F. Fondren, being duly sworn, says that she is the Petitioner in Review in the consolidated causes hereinabove referred to, acting in her individual capacity in her said Docket No. 107473 and acting as Independent Executrix of the Estate of W. W. Fondren, Deceased, in said Docket No. 107474; and that she has read the foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true.

ELLA F. FONDREN.

Subscribed and sworn to by Ella F. Fondren before me this the 27th day of July, 1943.

W. O. MANNING,

(W. O. Manning)

(Seal)

Notary Public in and for  
Harris County, Texas.

W. M. CLEAVES,

Attorney for Petitioner in Review,  
806 National Standard Building,  
Houston 2, Texas.

NOTICE OF FILING PETITION FOR REVIEW.

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Filed Sept. 1, 1943.

(Title Omitted.)

To: The Commissioner of Internal Revenue,  
Washington, D. C.,  
Respondent in Review.

You are hereby notified that the Petitioner for Review did on the 30th day of July, 1943, file with the Clerk of

The Tax Court of United States at Washington, D. C., a Petition for Review by the United States Circuit Court of Appeals for the Fifth Circuit of the decision of said Tax Court heretofore rendered in the above-entitled consolidated causes. A copy of the Petition for Review and the assignments of error as filed is hereto attached and served upon you.

(Sgd.) W. M. CLEAVES,  
(W. M. Cleaves)  
Counsel for Petitioner in  
Review.

806 National Standard Building,  
Houston 2, Texas.

Service acknowledged July 30, 1943.

(Sgd.) J. P. WENCHEL, CAR  
Chief Counsel, Bureau of  
Internal Revenue.

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## STIPULATION.

Filed at Hearing October 19, 1942.

United States Board of Tax Appeals.

Ella F. Fondren, Petitioner,

vs.

Docket No. 107473.

Commissioner of Internal Revenue, Respondent.

and

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, Petitioner,

vs.

Docket No. 107474.

Commissioner of Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between parties to these proceedings, through their respective counsel, that

the following facts are true, this agreement and stipulation being subject however to the right of either of the parties to present further evidence not inconsistent with the agreed and stipulated facts:

1. From long prior to March 20, 1930, and continuously until January 5, 1939, the date of the death of W. W. Fondren, the said W. W. Fondren and wife, Ella F. Fondren, lived together as husband and wife and during all of said time maintained their residence and domicile within the State of Texas.

2. Under date December 17, 1935, by formal written instruments duly signed and acknowledged by said W. W. Fondren and Ella F. Fondren before W. O. Manning, Notary Public in and for Harris County, Texas, the said W. W. Fondren and wife, Ella F. Fondren, made, established, published and declared five (5) certain trusts and by the terms of each of said formal written instruments constituted the said W. W. Fondren trustee to administer the trusts with the further provision that upon the death or resignation of said W. W. Fondren the said Ella F. Fondren should succeed to the trusteeship and with further provisions providing for the appointment of successor trustees, all as in said written instruments expressly provided.

3. Of the said five (5) certain written instruments next above referred to:

(a) One of said written instruments made, established, published and declared a trust for Ellanor Anne Fondren, the daughter of Walter W. Fondren, Jr., and successor beneficiaries as therein provided;

(b) One of said written instruments made, established, published and declared a trust for Mary Doris Fondren, the daughter of Walter W. Fondren, Jr., and successor beneficiaries as therein provided;

(c) One of said written instruments made, established, published and declared a trust for Peter Fondren Underwood, the son of Catherine Fondren Underwood, and successor beneficiaries as therein provided;

(d) One of said written instruments made, established, published and declared a trust for Wash Bryan Trammell, Jr., the son of Sue Fondren Trammell, and successor beneficiaries as therein provided;

(e) One of said written instruments made, established, published and declared a trust for Sue Trammell, the daughter of Sue Fondren Trammell, and successor beneficiaries as therein provided.

4. Under date December 7, 1936, by formal written instrument duly signed and acknowledged by said W. W. Fondren and Ella F. Fondren before W. O. Manning, Notary Public in and for Harris County, Texas, the said W. W. Fondren and wife, Ella F. Fondren, made, established, published and declared a certain trust for the benefit of Walter William Fondren III, the son of Walter William Fondren, Jr., and successor beneficiaries as therein provided and by the terms thereof constituted the said W. W. Fondren Trustee to administer the trust with the further provision that upon the death or resignation of said W. W. Fondren the said Ella F. Fondren should succeed to the trusteeship and with further provisions providing for the appointment of successor trustees all as in said written instruments expressly provided.

5. Under date December 2, 1937, by formal written instrument duly signed and acknowledged by said W. W. Fondren and Ella F. Fondren before W. O. Manning, Notary Public in and for Harris County, Texas, the said W. W. Fondren and wife, Ella F. Fondren, made, established, published and declared a certain trust for the benefit of David

Milton Underwood, the son of Catherine Fondren Underwood, and successor beneficiaries as therein provided and by the terms thereof constituted the said W. W. Fondren trustee to administer the trust with the further provision that upon the death or resignation of said W. W. Fondren, the said Ella F. Fondren should succeed to the Trusteeship and with further provisions providing for the appointment of successor trustees all as in said written instrument expressly provided.

6. The said Ellanor Anne Fondren, daughter of Walter W. Fondren, Jr., was born July 23, 1932.

The said Mary Doris Fondren, daughter of Walter W. Fondren, Jr., was born March 20, 1930.

The said Peter Fondren Underwood, son of Catherine Fondren Underwood, was born October 1, 1935.

The said Wash Bryan Trammell, Jr., son of Sue Fondren Trammell, was born March 10, 1935.

The said Sue Trammell, daughter of Sue Fondren Trammell, was born August 5, 1933.

The said Walter William Fondren III, son of Walter William Fondren, Jr., was born April 29, 1936.

The said David Milton Underwood, son of Catherine Fondren Underwood, was born March 5, 1937.

The said Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., Sue Trammell, Walter William Fondren III and David Milton Underwood are all grandchildren of said W. W. Fondren and Ella F. Fondren.



7. By the provisions of each of the seven (7) above mentioned written instruments it was expressly provided that the said W. W. Fondren and wife, Ella F. Fondren, and each of them might from time to time transfer, assign and deliver to the trustee additional property for the benefit of the particular beneficiary and successor beneficiaries for the purpose of augmenting the particular trust.

8. On or about December 2, 1937, the said W. W. Fondren gave to said W. W. Fondren Trustee of and for each of said above mentioned seven (7) trusts one hundred (100) shares of Humble Oil & Refining Company stock; and on or about the same date, to-wit, December 2, 1937, the said Ella F. Fondren gave to the said W. W. Fondren Trustee of and for each of said above mentioned seven (7) trusts one hundred (100) shares of Humble Oil & Refining Company stock, the said gift to the David Milton Underwood trust being the first gift to such trust, and the said gifts to the respective trusts for the other grandchildren being gifts in augmentation of the respective trust estates as theretofore existing.

9. The fair market value of Humble Oil & Refining Company stock on December 2, 1937, the date on which said gifts to said respective trusts were made by said W. W. Fondren and Ella F. Fondren, was \$59.75 per share so that the fair market value of each of said 100 share gifts was \$5,975.00.

10. W. W. Fondren continued to act as trustee in the administration of each and all of the trusts hereinabove mentioned until his death on January 5, 1939. Upon the death of W. W. Fondren the said Ella F. Fondren succeeded to the trusteeship of each and all of said trusts, as provided for therein, which trusteeship she has continuously since exercised and now exercises.



11. The said beneficiaries, Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., Sue Trammell, Walter William Fondren III, and David Milton Underwood are each and all now living.

12. W. W. Fondren left a will naming Ella F. Fondren Independent Executrix of his Estate and in due time Ella F. Fondren made her application to the Probate Court of Harris County, Texas, for the probate of said will and for letters testamentary, and in due course the will was proved and admitted to probate and said Ella F. Fondren appointed and qualified as Independent Executrix of the Estate of W. W. Fondren, Deceased, and the said Ella F. Fondren is now the duly appointed, qualified and acting Independent Executrix of the Estate of W. W. Fondren, Deceased.

13. At all times subsequent to the creation of the trusts hereinabove specifically referred to the parents of said beneficiaries, Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., Sue Trammell, Walter William Fondren III, and David Milton Underwood have respectively, adequately, and sufficiently provided for the proper and adequate support, maintenance and education of the said Ellanor Anne Fondren, Mary Doris Fondren, Peter Fondren Underwood, Wash Bryan Trammell, Jr., Sue Trammell, Walter William Fondren III, and David Milton Underwood with the result that no part of either income or corpus of either of said trust estates has been distributed, used, or applied to or for the benefit, support, maintenance or education of either of said beneficiaries.

14. In due time said W. W. Fondren and Ella F. Fondren filed in regular course their Gift Tax Returns for the calendar year 1937 and in said Gift Tax Returns showed each of

the above referred to gifts to said above referred to seven (7) respective trusts and in connection with each of said gifts in trust the said W. W. Fondren and Ella F. Fondren each claimed the statutory of \$5,000.00 annual exclusion and therefore respectively reported as to each of said gifts a taxable gift for the year 1937 in the amount of \$975.00 representing the difference between the annual \$5,000.00 exclusion and the fair market value of the particular gift, to-wit, \$5,975.00. Said W. W. Fondren and Ella F. Fondren then in regular course paid gift taxes on the basis of the taxable gifts so reported by them respectively as to each of said respective trusts.

15. In addition to the foregoing seven (7) gifts made in trust for the benefit of their grandchildren the said W. W. Fondren and Ella F. Fondren each made direct gifts in the year 1937 to their three (3) children as follows:

(a) Walter W. Fondren, Jr., son, 100 shares of Humble Oil & Refining Company stock having a fair market value on date of gift of \$59.75 per share, or a total value of said gift of \$5,975.00.

(b) Catherine Fondren Underwood, daughter, 100 shares of Humble Oil & Refining Company stock having a fair market value on date of gift of \$59.75 per share, or a total value of said gift of \$5,975.00.

(c) Susie Fondren Trammell, daughter, 100 shares of Humble Oil & Refining Company stock having a fair market value on date of gift of \$59.75 per share, or a total value of said gift of \$5,975.00.

In their gift tax returns filed for the year 1937, the said W. W. Fondren and Ella F. Fondren each claimed a \$5,000.00 exclusion with respect to each of the foregoing

gifts made directly to their three children (or total exclusions of \$15,000.00 as to each petitioner with respect to said gifts).

16. The total amount of the net gifts made by W. W. Fondren for the taxable years preceding 1937, other than charitable, public and similar gifts, was reported by him in his gift tax return for 1937 to be \$1,234,847.50, and was redetermined by the Commissioner to be \$1,284,847.50.

17. The total amount of the net gifts made by Ella F. Fondren for the taxable years preceding 1937, other than charitable, public and similar gifts, was reported by her in her gift tax return for 1937 to be \$1,218,600.00, and was redetermined by the Commissioner to be \$1,263,600.00.

18. The adjustments made by the Commissioner in determining the total gifts made by petitioners for the years prior to 1937, as set out in paragraphs 16 and 17, above, are of no significance in these proceedings, inasmuch as it is agreed by the parties that the amounts of any additional gift taxes which may be found to be due from petitioners for the taxable year 1937, are to be computed at the rate of 24% on the additional net gifts, if any, ultimately determined to have been made by the respective petitioners for said year 1937.

19. In determining the deficiencies in gift taxes against petitioners for the taxable year 1937, which are involved in these proceedings, the Commissioner allowed to each petitioner three exclusions of \$5,000.00 each with respect to the direct gifts made in that year to their three children and disallowed to each petitioner the seven exclusions of \$5,000.00 each (or total exclusions of \$35,000.00 as to each petitioner) which had been claimed in their gift tax returns on account of the gifts made in trust for the benefit of their seven grandchildren. In disallowing the seven exclusions

so claimed the Commissioner made the explanation, in the deficiency notices, that said gifts constituted gifts of future interests in property against which no exclusions are allowable.

20. True copies of the deficiency notices, with the statements attached thereto, which were issued by the Commissioner to W. W. Fondren and Ella F. Fondren under date of March 10, 1941, with respect to the additional gift taxes determined against them for the taxable year 1937, are attached hereto and marked Exhibits A and B, respectively, and are made a part of this stipulation.

21. It is further understood and agreed by the parties hereto that true and correct copies of the seven trust instruments hereinbefore referred to, pursuant to which petitioners established the trusts for their seven grandchildren, will be offered on behalf of petitioners and may be received in evidence without objection, at the hearing of these proceedings.

22. The parties also agree that these proceedings, involving a common issue as to proposed additional gift taxes of petitioners, husband and wife, may, for convenience, be consolidated for hearing and decision before the Board.

W. M. CLEAVES,

(W. M. Cleaves)

Counsel for Petitioners.

J. P. WENCHEL, JLB

(J. P. Wenchel)

Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

55 For EXHIBIT "A" (Deficiency Letter and Statement of W. W. Fondren (deceased) Dkt. No. 107474, See Pages 22, 23 and 25 of petition.

For EXHIBIT "B" (Deficiency Letter and Statement of Ella Fondren, See Petition, Pages 10, 11 and 13, Dkt. No. 107473.

56 PETITIONER'S EXHIBIT 1-D.

October 19, 1942

The State of Texas,  
County of Harris.

Know All Men By These Presents: That we, W. W. Fondren and his wife, Ella F. Fondren, of the State of Texas and County of Harris, and hereinafter referred to as Grantors, do hereby make, establish, publish, and declare a trust and gift for our Grandson, Wash Bryan Trammell, Jr., the son of our daughter, Sue Fondren Trammell, upon the terms, conditions and with the limitations hereinafter set forth, and for the purposes and objects herein expressed; and in consideration thereof, and in consideration of the love and affection which we bear to our said Grandson, we have granted, assigned, transferred, set apart and conveyed, and by these presents do grant, assign, transfer, set apart and deliver, to W. W. Fondren, as Trustee, and only in his capacity as Trustee, and to his successor and successors as such Trustee, all of the property described in "Exhibit A" which is hereto attached, marked with the initials of the Grantors for identification, and made a part hereof in the same manner and to the same effect as if fully set forth in detail in the face of this instrument; said property consisting of one hundred (100) shares of the capital stock of the

Humble Oil & Refining Company, a Texas corporation, which we have caused to be issued to said W. W. Fondren, Trustee, for the uses, purposes, and objects of this Trust.

To Have And To Hold all and singular the above described property, together with such other property as we or either of us may hereafter at any time and from time to time assign, transfer and convey for the augmentation of this Trust, to the said W. W. Fondren, Trustee, his successor or successors, but all in trust, nevertheless, for the uses, purposes, objects and benefits as hereinafter set forth.

The terms, conditions, powers, authorities, limitations, and restrictions upon and to the Trustee are as hereinafter set forth, and said property is accepted by said Trustee solely in his capacity as such Trustee, in accord with the terms hereof, and shall be held, managed, controlled, and disposed of by the said Trustee and his successor or successors solely as herein provided.

#### Article One.

It is contemplated that the Grantors herein, and each of them, may from time to time transfer, assign and deliver to said Trustee, or his successor or successors, additional property for the benefit of our said Grandson, for the purpose of augmenting this Trust. In case any such transfer, assignment and delivery shall be made to such Trustee, such additional property so assigned, transferred and delivered shall constitute and immediately be and become a part of the trust fund hereby created for the benefit of our said Grandson, and shall be in all things controlled, handled, managed and disposed of in accordance with the provisions of this instrument; and the acceptance of this Trust by the Trustee or any successor Trustee shall be



held to be the consent of such Trustee to the provisions of this instrument; and the acceptance by the Trustee of any gift or grant, from any source whatsoever, for the purpose of augmenting this Trust shall be a sufficient acceptance of such property under the terms and conditions hereof.

Whenever the Grantors, or either of them shall desire to make any additional gift or gifts to increase the trust estate created hereby, if the gift be personal property the Grantors shall make a description or a list thereof similar to that contained in "Exhibit A", initial the same, and deliver the list, together with the personal property comprising the gift, to the Trustee. If the gift be real estate, a similar list shall be made, and a deed or deeds conveying said real estate to the Trustee, as such Trustee, shall be duly executed by the donor and delivered to the Trustee. Any gift so made and delivered shall be, become, and remain a part of the trust estate hereby created, without any other or further action on the part of anyone, and shall thereupon be, become and remain an irrevocable gift to the trust estate.

#### Article Two.

There is hereby conferred upon and granted to the Trustee full power and authority to take, hold and receive said property, to manage, control and handle the same, to sell, mortgage, pledge, encumber, or otherwise dispose of the same, to invest, reinvest, and keep invested all the proceeds received from the earnings or income from said property, or any sale or sales thereof, so as to make said estate earn the best net income consistent with safety of investment and sound business principles. Said Trustee shall have full power and authority to sell in lots or parcels or in its entirety any and all of the property at any time belonging to said Trust Estate (including that granted herein and also including all property hereafter acquired



in any manner whatsoever for or by said trust estate), for such price, for such purposes, and upon such terms and conditions as in the judgment of the Trustee may be for the best interest of the trust estate. Said Trustee shall have full power and authority to institute, prosecute, maintain, and defend any and all suits, actions and legal proceedings in any and all Courts which may be necessary in the judgment of the Trustee for the protection or for the enforcement of the interests of the trust estate. The Trustee shall employ, at the expense of the trust estate, such accountants, agents and attorneys as may from time to time, in the judgment of the Trustee, be for the best interests of the trust estate. The exercise by the Trustee of any power herein conferred upon the Trustee shall not exhaust the power of the Trustee, it being intended that such power shall continue as to every part and parcel of said trust estate so long as said trust estate or any part thereof may be in the hands of the Trustee or his successor or successors, and may be exercised as often as and whenever in the judgment of said Trustee such exercise is necessary, or advisable for the best interests of said trust estate.

### Article Three.

Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors, or either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, using only the income of said estate for the purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose for the benefit of our said Grandson.

It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our said Grandson shall be properly maintained, educated and supported, and if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged.

This Trust shall endure and continue until our said Grandson attains the age of twenty-five years, at which time the Trustee then acting shall deliver to him twenty-five per cent (25%) of said trust estate and its accumulations, if any, and shall retain the remainder thereof until our said Grandson shall attain the age of thirty years, when the Trustee shall deliver to him thirty-three and one-third per cent (33-1/3%) of the total amount of said estate then in his possession, including also the accumulations thereof; and the remainder of said trust estate shall be continued thereafter until our said Grandson shall reach the age of Thirty-five years, at which time all of said trust estate remaining in the hands of the trustee shall then be delivered to our said Grandson. These deliveries, however, are conditioned upon and subject to the continued life of our said Grandson until each such period is reached.

If our said Grandson, Wash Bryan Trammell, Jr., shall die leaving issue him surviving, before all of said trust estate shall be delivered to him, the said Wash Bryan Trammell, Jr., then said trust estate then held by the Trustee shall be held and administered by the Trustee for the benefit of such surviving issue of the said Wash Bryan Trammell, Jr., and shall be delivered to such issue, share and share alike, when the youngest of such issue shall attain the age of twenty-one years. If our said Grandson shall die without issue before the trust estate is finally delivered in full to him under the terms hereof, then all of the trust estate in the hands of the Trustee at the time of his death shall be held and administered by the Trustee for the use and benefit of our Granddaughter, Sue Trammell, and shall be distributed to her in the same manner and at the same periods of her age as herein provided for our said Grandson, Wash Bryan Trammell, Jr.; and if she, the said Sue Trammell, shall die before said estate is delivered to her by the Trustee under the terms hereof and leave issue her surviving, said estate shall be held and administered by the Trustee for the benefit of such issue, and when the youngest of such issue shall attain the age of twenty-one years said estate shall be delivered to such issue share and share alike. If the said Sue Trammell shall die without issue, however, before the distribution of said trust estate is completed, the amount then in the hands of the Trustee shall descend to and be distributed to her heirs under the laws of the State of Texas.

During the continuance of this trust the Trustee shall make semi-annual reports to W. B. Trammell, the father of our said Grandson, so long as he shall live; and if he shall die, such reports shall be made to Sue Fondren Trammell, the mother of our said Grandson; and if the mother shall die, said reports shall be made to the legal guardian of said Wash Bryan Trammell, Jr., until he attains the age of twenty-one years, and thereafter shall be made to him.

The Trustee shall keep an accurate account of all receipts and disbursements, and his books, papers and accounts shall at all reasonable times be open to each beneficiary herein named, who may at the time be interested in said estate, and to the father and to the mother of said Wash Bryan Trammell, Jr., or to any person designated by either of them, for the purpose of examination, checking, verification, and accounting.

#### Article Four.

The Trustee shall at all times exercise reasonable care in the management of said trust estate and in the sale and purchase of securities and in the investment and re-investment of the moneys of said estate, but he shall not be held liable or accountable for any loss in selling or converting said securities or investing the proceeds of the sale thereof, or any other moneys belonging to said estate, except for willful or gross mismanagement of said estate; nor shall said Trustee be held liable for or required to make up any loss because of moneys remaining uninvested, or which he may be unable to invest, provided always that he has not been grossly negligent in failing to invest said estate or in keeping the same invested. The Trustee shall not be personally liable to the estate for the negligence of any person employed by him to perform any service for said estate, provided that the Trustee exercised reasonable care in the selection and employment of such person.

#### Article Five.

The purpose in creating this trust is to provide for the personal comfort, support, maintenance and welfare of our said Grandson. No part of said trust fund hereby created or hereafter augmented by Grantors shall ever be liable for any of the debts, liabilities, charges, or liens which our said Grandson may owe, become liable for, contract, or incur.

All sales, conveyances, assignments, transfers, pledges, incumbrances, or other dispositions of any kind or character whatsoever, whether voluntary or involuntary, for any beneficiary under this trust, shall be absolutely void and of no force or effect. No such debts, liabilities, charges, liens, sales, conveyances, assignments, transfers, pledges, incumbrances, or other disposition of any part or parcel of said estate by any beneficiary hereunder shall ever be recognized in any manner whatsoever by the Trustee. Said trust shall never be subject to any Court process subjecting or attempting to subject such trust fund to the payment of any debt or obligation of our said Grandson, or of any beneficiary hereunder, of any kind or character whatsoever, and all transfers, conveyances, assignments, liens, pledges, and incumbrances, voluntary or involuntary, by any beneficiary of said trust estate, or any part thereof, or of any part interest therein, howsoever made, and all Court process, writs, and proceedings against said estate to subject it to the payment of any debt, liability, charge, lien, transfer, pledge, or incumbrance of any beneficiary hereunder shall be wholly void and of no avail.

#### Article Six.

The Grantors herein, without in any respect retaining any interest in the trust estate hereby created, or in any benefits accruing therefrom, which trust is made absolute and finally irrevocable do hereby reserve unto themselves jointly, and to the survivor of them, the right, power and privilege, notwithstanding any provision heretofore set forth herein, to remove from time to time any Trustee at the time acting hereunder, and to name and appoint a successor to such Trustee. In order for such removal to be effective, the Grantors herein or the survivor of them, as the case may be, shall by an instrument in writing, directed to the Trustee then acting, give notice of such Trustee's removal and the appointment of his successor. It is under-

stood, however, that this power shall not extend to the removal of W. W. Fondren as Trustee, nor to the removal of Ella F. Fondren as Trustee, who is hereinafter designated as successor Trustee in the event of the death or resignation of said W. W. Fondren.

Any successor Trustee appointed by the Grantors herein, or the survivor of them, as the case may be, shall be vested with and shall have, hold and exercise all the rights, titles, powers, privileges and obligations of the Trustee named herein, with like force and effect as if such successor or successors were originally named and appointed herein.

Said designation of a new Trustee may be made whenever and as often as the Grantors herein named or the survivors of them shall deem it to the best interests of the trust estate; but it is distinctly understood, however, that this trust is absolutely irrevocable, and the Grantors reserve no rights in themselves to any interest in said trust estate, nor to any income therefrom, nor to any increase thereof, of any kind or character whatsoever, and reserve no control over the same except under the terms of this Trust as Trustees, and reserve to themselves no defeasance of said trust estate under any terms, conditions or circumstances whatsoever; and that whenever W. W. Fondren or Ella F. Fondren is acting as Trustee of said Estate all acts in the control, management and disposition of said estate shall be acts as Trustee and not individually, it being distinctly provided that the Grantors have no individual interest of any kind or character in, to or unto said trust estate, or any part thereof.

It is also provided that so long as W. W. Fondren or Ella F. Fondren shall be, become or act as Trustee hereunder no bond or other security shall be required of such Trustee for the faithful performance of the Trustee's duties hereunder, nor shall any bond or other security be required of any suc-



cessor Trustee who may be designated by the Grantors herein or by the survivor of them, as the case may be, nor shall any bond or other security be required of the National Bank of Commerce, hereinafter named as successor Trustee herein.

#### Article Seven.

Any Trustee may at any time resign, and upon making accounting and settlement for his trusteeship in handling said estate shall be relieved from further liabilities.

It is especially provided that W. W. Fondren shall be Trustee for said estate so long as he shall live, unless he shall resign; that upon his death or resignation, if she be then living, his wife, Ella F. Fondren, shall immediately be and become Trustee of said trust estate, possessing and exercising all of the rights, powers, privileges, and duties herein conferred upon said W. W. Fondren as Trustee; and no action on the part of anyone shall be necessary to effect such appointment and to put in operation the trusteeship of the said Ella F. Fondren. In the event of the death, resignation or refusal to act of both W. W. Fondren and Ella F. Fondren, then and in such event the National Bank of Commerce, a banking corporation chartered under the laws of the United States and having its principal office and place of business in the City of Houston, in Harris County, Texas, shall immediately be and become Trustee of said trust estate possessing and exercising all of the rights, powers, privileges, and duties herein conferred upon said W. W. Fondren as Trustee, and no action on the part of anyone shall be necessary to effect such appointment and to put in operation the trusteeship of the said The National Bank of Commerce of Houston, Texas. In the event said The National Bank of Commerce shall become Trustee hereunder subject to the power of removal by the Grantors



as herein provided for, said Bank shall continue as such Trustee notwithstanding its consolidation with other banks or change of its corporate name or renewal of its corporate charter or reorganization of its corporate structure, so long as it shall have power and authority under the laws of the State of Texas and of the United States to act as such Trustee, it being our intention and desire that no such change shall affect its authority as Trustee.

It is provided, however, that during the life of both Grantors herein they may jointly designate any Trustee they may select, and notwithstanding any other provisions herein to the contrary. Any Trustee so appointed shall possess, have, hold and exercise all powers over the trust estate herein granted to the Trustee herein named; and the Grantors, or the survivor of them, may remove any such Trustee so appointed by them in the manner herein provided for, for the removal of any Trustee. It is also provided that the surviving Grantor herein may resign as Trustee, and designate a successor Trustee, who shall have, hold and exercise all of the powers herein conferred upon the said W. W. Fondren, as Trustee, and such survivor may also remove such Trustee as herein provided.

In the event that the Grantors herein, or the survivor of them, shall designate a trustee as herein provided for, no action shall be necessary to effect such appointment, except to sign an instrument in writing, stating that such Trustee has been selected and appointed by the Grantors, or the survivor of them, for the administration of this Trust. Any Trustee so appointed shall supersede all other Trustees named in this instrument and, subject to removal as herein provided for, shall continue<sup>2</sup> as Trustee of said trust estate.

If at any time there be no acting Trustee of said Estate and both the Grantors herein shall be deceased, then any

person interested in said trust estate for and on behalf of the beneficiary herein named or any beneficiary herein named, may apply to the District Court of Harris County, Texas, for the appointment of a Trustee, and such Court shall thereupon have full and complete jurisdiction and power to appoint a Trustee for the administration of said trust estate. It is not intended to restrict the power of the Court as to such appointment, but it is earnestly recommended that in such event the Court will appoint some Bank or Trust Company doing business in Houston, Texas, and having a paid-up capital of not less than Five Hundred Thousand Dollars, as such Trustee, and shall fix the compensation which said Trustee is to receive for the administration of the Trust; and any such order on the part of the Court, when properly entered, shall be binding upon all parties who may have any interest at any time in this trust. If the Court shall make an appointment other than as above requested, the Court is requested to fix the amount of security that such appointee will be required to give for the administration of the Trust and to approve the same before the appointment shall become effective.

For the protection, education, support and maintenance of our said Grandson we have made and executed this instrument, and have delivered to the Trustee herein named the securities described in "Exhibit A" hereto attached, and have completed the same, all on this the 17 day of December, A. D. 1935.

(Signed) ELLA F. FONDREN,

(Signed) W. W. FONDREN,

Grantors.

The State of Texas,  
County of Harris:

Before me, the undersigned authority, on this day personally appeared W. W. Fondren and Ella F. Fondren, his wife, known to me to be the persons whose names are sub-

scribed to the foregoing instrument, and the said W. W. Fondren acknowledged to me that he executed the same for the purposes and consideration therein expressed. And the said Ella F. Fondren, wife of the said W. W. Fondren, having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said Ella F. Fondren, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

Given under my hand and seal of office this 17 day of December, A. D. 1935.

(Seal) (Signed) W. O. MANNING,  
Notary Public in and for  
Harris County, Texas.

# EXHIBIT "A".

This Exhibit contains a description of the property given by the Grantors in the attached instrument, to the Grantee. In the first column is shown the name of the company in which shares of stock are donated; the second column the number of the Certificate of the shares of stock; the third column shows the number of shares of stock contained in the Certificate; the fourth column is the date of the issuance of the certificate; and the fifth column is the name of the Trustee to whom the certificate of stock is issued for the benefit of the Grantee herein.

Name of the Company Issuing Stock	Certificate Number	Number of Shares	Date of Issue	Name of Trustee
Humble Oil & Ref. Co.	T - 4002	100	12-23-35	W. W. Fondren
Houston Ltg. & Pwr. Co.	406415	1 Sh. 7% Pfd.	1-2-36	W. W. Fondren
Humble Oil & Ref. Co.	T - 4156	100	12-7-36	W. W. Fondren
Humble Oil & Ref. Co.	T - 4146	100	12-7-36	W. W. Fondren

# STIPULATION IN CONNECTION WITH PETITION FOR REVIEW.

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Received Aug. 20, 1943.

Filed August 20, 1943.

In the Tax Court of the United States.

Ella F. Fondren, Petitioner in Review,

vs.

Docket No. 107473.

Commissioner of Internal Revenue, Respondent in Review.

and

In the Tax Court of the United States.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix,

vs.

Docket No. 107474.

Commissioner of Internal Revenue, Respondent in Review.

In connection with the preparation of the record of the proceedings had before The Tax Court of the United States in the above-styled consolidated causes and for the sake of brevity, all parties to said causes acting herein by their attorneys of record stipulate that all seven declarations of trust which were introduced in evidence before The Tax Court upon the trial of above causes, being Exhibits Nos. 1-A, 1-B, 1-C, 1-D, 1-E, 1-F and 1-G introduced by Petitioners, under and with respect to which each of the gifts which are the subjects of the tax deficiencies involved in such causes were made, were at the time of the respective gifts, for the purposes of this Review, substantially of the same effect as is that certain Declaration of Trust executed by W. W. Fondren and wife, Ella F. Fondren, for the bene-

fit of Wash Bryan Trammell, Jr., dated December 17, 1935, and which was introduced at such trial as said Exhibit 1-C, saving and excepting only that the names and gender of the primary beneficiaries of said trusts vary in order to create a different trust for each of such seven primary beneficiaries, who are named in the opinion of The Tax Court of the United States.

And it is hereby agreed and stipulated by and between Petitioners in Review and Respondent in Review that, for the purposes of this review, such substantial similarities of said Declarations of Trust shall be taken as proven in the Court below and that this stipulation may be treated as a part of the record for this review without the necessity of copying each of said Declarations of Trust into the record.

Agreed to this the 14th day of August, 1943.

ESTATE OF W. W. FONDREN,  
DECEASED, ELLA F. FONDREN,  
INDEPENDENT EXECUTRIX,

By W. M. CLEAVES,  
(W. M. Cleaves)  
Attorney,

ELLA F. FONDREN,  
By W. M. CLEAVES,  
(W. M. Cleaves)  
Attorney,

Petitioners in Review.

COMMISSIONER OF INTERNAL REVENUE,

By J. P. WENCHEL, CAR  
Respondent in Review.

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## PETITIONER'S EXHIBIT 2.

U. S. Board of Tax Appeals, Div . . . , Docket . . . , Admitted  
in Evidence Oct. 19, 1942.

For each of the calendar years 1937, 1938, 1939, 1940 and  
1941 Humble Oil & Refining Company paid annual divi-  
dends amount- to \$2.00 per share; and dividends for 1942  
paid by said company to date are on this same basis.

Of the 1937 dividends paid by the Humble Oil & Refin-  
ing Company only \$.62 $\frac{1}{2}$  per share were paid after the  
making of the 1937 gifts hereinabove referred to.

The fair and reasonable cost of support, maintenance and  
education of each of the grandchildren beneficiaries in ac-  
cordance with the standard of living to which they were  
accustomed prior to and during the year 1937 would rea-  
sonably be not less than \$750.00.

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PRAECIPE FOR RECORD ON REVIEW.

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Filed Aug. 20, 1943.

In the Tax Court of the United States.

Ella F. Fondren, Petitioner in Review,

vs.

Docket No. 107473.

Commissioner of Internal Revenue, Respondent in Review.

and

In the Tax Court of the United States.

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Inde-  
pendent Executrix,

vs.

Docket No. 107474.

Commissioner of Internal Revenue, Respondent in Review.



Whereas Petitioners in Review in the above consolidated causes desire the following documents, papers and matters to be incorporated in the record on review, to-wit:

1. The docket entries of proceedings before The Tax Court of the United States.

2. Pleadings before The Tax Court.

3. Findings of fact, opinion and decision of The Tax Court.

4. Petition for Review.

5. Statement of the evidence as included in the following:

(a) Stipulation of facts introduced at the hearing before The Tax Court of the United States;

(b) Copy of Petitioner's Exhibit 1-D, being Declaration of Trust by W. W. Fondren and Ella F. Fondren for Wash Bryan Trammell, dated December 17, 1935;

(c) Stipulation in Connection With Petition for Review as to substantial similarity of the several trust indentures introduced;

(d) Petitioner's Exhibit 2, introduced by Petitioners at the trial of these causes over Respondent's objection thereto on the ground of incompetency and irrelevancy.

Now therefore Petitioners in Review, Ella F. Fondren and the Estate of W. W. Fondren, Deceased, Ella F. Fondren, Independent Executrix, hereby request the Clerk of The Tax Court of the United States to prepare the record

and incorporate therein copies of the above listed documents, papers and matters for transmission to the Clerk of the Circuit Court of Appeals for the Fifth Circuit.

And Respondent in Review, the Commissioner of Internal Revenue, acting by his attorney of record, does hereby agree that such documents, papers and matters constitute a true and correct statement of evidence and record for review in said consolidated causes.

ESTATE OF W. W. FONDREN,  
DECEASED, ELLA F. FONDREN,  
INDEPENDENT EXECUTRIX,

By W. M. CLEAVES,  
(W. M. Cleaves)

Attorney,

Petitioner in Review.

ELLA F. FONDREN,

By W. M. CLEAVES,  
(W. M. Cleaves)

Attorney,

Petitioner in Review.

COMMISSIONER OF INTERNAL REVENUE,

By J. P. WENCHEL, CAR  
Respondent in Review.

## CERTIFICATE.

The Tax Court of the United States,  
Washington.

Ella F. Fondren, Petitioner,  
vs. Docket No. 107473.  
Commissioner of Internal Revenue, Respondent.

and

Estate of W. W. Fondren, Deceased, Ella F. Fondren, Inde-  
pendent Executrix, Petitioner,  
vs. Docket No. 107474.  
Commissioner of Internal Revenue, Respondent.

I, B. D. GAMBLE, Clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, i to 76, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 24th day of September, 1943.

(Seal)

B. D. GAMBLE,  
Clerk, The Tax Court of the  
United States.

[fol. 71] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz.:

# ARGUMENT AND SUBMISSION

Extract from the Minutes of February 2, 1944

No. 10829

ELLA F. FONDREN and the Estate of W. W. FONDREN, Deceased, ELLA F. FONDREN, Independent Executrix,

VERSUS

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by W. M. Cleaves, Esq., for petitioners, and Robert Koerner, Esq., Special Assistant to the Attorney General, for respondent, was submitted to the Court.

[fol. 72] OPINION OF THE COURT—Filed March 3, 1944

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

No. 10829

ELLA F. FONDREN and the Estate of W. W. FONDREN, Deceased, ELLA F. FONDREN, Independent Executrix, Petitioners,

VERSUS

COMMISSIONER OF INTERNAL REVENUE, Respondent  
Petition for Review of Decisions of the Tax Court of the  
United States (District of Texas)

(March 3, 1944)

Before Sibley, McCord, and Waller, Circuit Judges

McCord, Circuit Judge:

The appeal involves gift taxes for the calendar year 1937, and is taken in two cases which by agreement were consolidated and tried together.

Question: Are gifts of stock in augmentation of seven irrevocable trusts, gifts of future interests to which \$5,000 exclusions as to each are allowable under Section 504, (b) of the Revenue Act of 1932?

[fol. 73] Pertinent facts: During 1935, 1936 and 1937 taxpayer and her husband executed a separate trust instrument in favor of each of seven grandchildren, each being below the age of six years at the time the trust was created. On December 2, 1937 taxpayer and her husband each made a gift to each trust of 100 shares of Humble Oil & Refining Company stock of the value of \$59.75 a share, the fair market value of each of the 100 share gifts being \$5,975.00.

On their gift tax returns for 1937 taxpayer and her husband each claimed the statutory exclusion of \$5,000 for each of their seven gifts, reported a taxable gift for each trust of \$975.00, and paid gift taxes on this basis.

The trust instruments were substantially the same, the principal variation being with respect to the successor beneficiaries in the event of the death of either of the principal beneficiaries. All the beneficiaries were living when this proceeding was heard. The trusts were absolute and irrevocable, with no interest in the estate retained by the grantors. The grantors reserved the right to remove any active trustee except W. W. Fondren, and to name a successor trustee with the same rights, powers and authorities as the first trustee, a right which was also reserved to the survivor of the grantors. Each trust instrument provided that taxpayer and her husband might transfer, assign and deliver additional property to the trustee for the benefit of the beneficiary.

The stated purpose in creating each trust was to provide for the personal comfort, support, and maintenance and welfare of each grandchild. The trust was to continue until each grandchild attained the age of 35, but twenty-five per cent of the corpus and accumulations, if any, were to be delivered to the grandchild when he or she attained the age of 25; thirty-three and one-third per [fol. 74] cent ( $33\frac{1}{3}\%$ ) when he or she attained the age of 30; and the remainder when he or she attained the age of 35. If the beneficiary died leaving issue before termination of the trust, the estate was to be held and administered for the benefit of the issue and delivered when the youngest of such issue attained the age of 21. If the beneficiary died without issue before termination of the trust, successor

beneficiaries were provided for by the trust instruments. The trust funds were not to be liable for obligations of the beneficiary. A beneficiary could not anticipate his or her interest in the trust fund created, and such funds could not be reached by judgment creditors or others having claims against the beneficiary. The trustee was given full power and authority with respect to the management and control of trust funds. He could sell, mortgage, or pledge any or all of the trust funds, and could institute or defend suits or legal proceedings necessary in his judgment for the protection or enforcement of the interest of the trust estate. This power was to be in no wise diminished during the life of the trust.

W. W. Fondren was named trustee of each trust instrument. He died on January 5, 1939, and taxpayer, Ella F. Fondren, his wife, succeeded to the trusteeship.

At all times subsequent to the creation of the trust, the parents of the named beneficiaries have adequately and sufficiently provided for the support, maintenance and education of the children named in the trust. As a result, no part of the trust income or corpus has been distributed, used or applied for the benefit, support, maintenance or education of any one of the beneficiaries of the seven trusts.

The Tax Court found that the gifts of stock made by taxpayer and her husband in 1937 to the trust estates [fol. 75] were gifts of future interests as to which exclusions were not allowable in determining their gift tax liability for that year. The cases as consolidated are before us for review.

Decision must turn on that part of Article 3 of the trust instruments, which is as follows:

"Out of the trust estate hereby created and as the same may hereafter be augmented and increased by gift from the Grantors, or either of them as herein provided for, or from any other source whatsoever, the Trustee shall provide for the support, maintenance and education of our said Grandson, using only the income of said estate for the purpose if it be sufficient. If it be necessary to use any of the corpus of the estate for that purpose and in the judgment of the Trustee it is best to do so, said Trustee may make advancements out of the corpus of said trust estate for such purpose

for the benefit of our said Grandson. It is contemplated, however, that our said Grandson will have other adequate and sufficient means of support, and that it will not be necessary to use either the income or the corpus of the trust estate hereby created to properly provide for his education, maintenance and support; and, if the income from the trust estate be not needed for these purposes, then all of the income from said trust estate not so needed shall be by the Trustee passed to capital account of said trust estate, and shall be and become a part of said trust estate, it being our hope that all of the earnings and income of said trust estate during the period of this trust may be used to augment the trust estate and be delivered to our said Grandson at the periods herein provided for. It is expressly provided, however, that our Grandson shall be properly maintained, educated and supported, and [fol. 76] if it be necessary to use all of the income and even all of the corpus of the trust estate hereby created and all augmentations thereof, it shall be the duty of the Trustee to see that this obligation shall be properly and reasonably discharged. \* \* \*

Treasury Regulations 79 (1930 ed.) Article 11, defines future interests and has been quoted with approval by our court of last resort: "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time \* \* \*.

So that, we find the answer to our question: When Article 3 of the trust instrument is measured by decision it becomes patent that the trust gifts here in question were gifts of future interests and the seven exclusions in question are clearly not allowable.

*United States v. Pelzer*, 312 U. S. 399; *Ryerson v. United States*, 312 U. S. 405; *Fisher v. Commissioner of Internal Revenue*, 132 F. (2d) 383; *Commissioner of Internal Revenue v. Wells*, 132 F. (2d) 405; *Seusenbrenner v. Commissioner of Internal Revenue*, 134 F. (2d) 883; *Commissioner of Internal Revenue v. Phillips' Estate*, 126 F. (2d) 851.



The decision of the Tax Court is affirmed.

WALLER, Circuit Judge, dissenting:

The trusts here were irrevocable. There was no defeasance, reversion, nor was any benefit retained in the donors. This was expressly stated in Article 6 of the trust indenture.

[fol. 77] The grandchildren were all of tender years when the trust was created, the oldest one being less than six at the time the trust was created, and the ages of several being counted in months rather than in years.

These grandchildren were given the fullest "use, possession, and enjoyment" that was possible sensibly to confer upon children of such tender age. If the reasoning of the respondent and the Tax Court is correct, then there could never be a substantial gift to a baby except a gift of a future interest, for always is it necessary for some person *sui juris* to handle, manage, conserve, and utilize the property of a child of tender years until he is old enough to manage it himself.

Whether or not a substantial gift of money, or its ready equivalent, is a gift of a future interest should be determined by the time and finality of its vesting rather than the time and manner of its spending.

Viewed in the light of the definition in the Treasury regulations that an interest or estate which is to commence in "use, possession, or enjoyment at some future date and time" is a future interest, we find that the beneficiaries of the trust here, being children of tender years, are possessed of the highest and best use and enjoyment possible to confer upon such young children. To donate and deliver shares of stock to a babe in the cradle, with no direction, custody, or management, would be the height of folly. Valuable shares of stock are not given to babes in cradles to chew up or use as a substitute for a pacifier. But here the corpus is being managed and preserved, and the income is being collected and safeguarded by trustees vitally interested in the welfare of the *cestuis que trust*. Both the income and the corpus are irrevocably dedicated to the support, maintenance, and welfare of these children—the object of the trust. The gift stands between them and [fol. 78] adversity like a "rock in a weary land, a shelter in time of storm". It is submitted that the irrevocable

vesting of such rights in property is a "present use", a "present enjoyment", of such property; that one who has the right to spend the issues, rents, and profits from an estate, or to have same spent for his benefit, has both the present use and present enjoyment of such an estate. If an adult donee of such a gift saw fit to leave the corpus of the gift intact and to accumulate the income for himself at a future date, this would not convert a present gift into a future interest, nor would such a handling of a minor's estate by one in *loco parentis*, operating either pursuant to statute or pursuant to the solemn obligations of trusteeship, convert a present and irrevocable gift into a future interest.

The cases cited in support of the majority opinion are dissimilar and undecisive of the issues here. Some of the distinguishing features of the cited cases will be pointed out:

*United States vs. Pelzer*, 312 U. S. 399—No beneficiary could receive any benefit from the trust before the end of ten years or before he was twenty-one, whichever occurred last, and then only if he survived. It was a trust for the benefit of eight grandchildren with provision for any after-born grandchildren.

*Ryerson vs. United States*, 312 U. S. 405—The trust was terminable by the joint action of two trustees or by the death or mental incapacity of either of the trustees. The trust had numerous other conditions not present here.

*Fisher vs. Commissioner*, 132 F. 2d 383—The distribution in this case was to the grandchildren who were twenty-one years of age or to the parents of any under twenty-one for the use and benefit of the parents. One-sixth of the corpus [fol. 79] was to be distributed to each grandchild upon attaining the age of twenty-five years or to his issue if the said grandchild was not living, or, in case of death without issue, to the surviving grandchildren and to the children of the grandchildren that were deceased.

*Commissioner of Internal Revenue vs. Wells*, 132 F. 2d 405—The amount of income and principal to be distributed to the beneficiary was left entirely in the discretion of the trustee.

*Sensenbrenner vs. Commissioner*, 134 F. 2d 893—The income was to be paid to the donor or to another party to be designated by the donor to be used by such dis-

tributee for the support, maintenance, and education of the grandchild in such manner as the distributee in his sole discretion deemed best. Thus, the trustee was not only not required to expend the income for the beneficiary but could not even compel the distributee so to do.

*Commissioner vs. Phillips' Estate*, 126 F. 2d 851—The trust agreement provided that it should not be obligatory or mandatory on the trustee to pay any income or allowance to said beneficiaries prior to the death of the donor or prior to the expiration of ten years from the date of trust agreement. Of course, this was a gift of a future interest from which no use or enjoyment might ever come to any beneficiary.

It is conceded, however, that there are decisions supporting the majority view, but it is submitted that these decisions were in cases dissimilar from the present, or where the Court failed to take into consideration the fact that the "use and enjoyment" can only mean such use and enjoyment as the donee is at the time capable of exercising, thereby rendering it necessary for the intervention of a third party or trustee to hold, use, and possess for [fol. 80] such donee, which in law is use and possession for and by the donee *in praesenti* and not *in futuro*.

In the present case the trustees were to use both the income and the corpus for the best interest of the beneficiaries, it being hoped it would not be necessary to spend the child's estate. The trustee was expected to do no more than would a guardian have been expected to do. The child's welfare was the *summum bonum* of the trust.

The vesting of a gift can be made dependent upon the discretion of a trustee if the language of the trust instrument leaves the matter to the sole discretion of the trustee, but in the present trust instrument the test is the need, comfort, and welfare of the beneficiary. The discretion of the trustee is far from absolute. The trustee here could not withhold support from one of his necessitous *cestuis que trust*, without plainly violating his trust, and this equity would prevent.

The fact that death might intervene before the *cestui que trust* comes into full possession of the entire gift does not make the entire gift one of future interest, and the statute does not make provision for a *pro tanto* tax. A present gift to a trustee for the use of another is a present

gift to that other, and a donor does not have to abolish death in order to make a managed gift to an infant.

I hesitate to ascribe to Congress the absurd design to tax a gift to a babe in arms because his estate must be [fol. 81] managed by someone *sui juris*, exercising the powers of a guardian or parent, while a gift to an adult, requiring no managing third party, is tax free. Congress likes adult voters, but surely not that well.

[fol. 82]

### JUDGMENT

Extract from the Minutes of March 3, 1944.

No. 49829

ELLA F. FONDREN and the ESTATE of W. W. FONDREN, deceased, ELLA F. FONDREN, Independent Executrix,

VERSUS

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Ella F. Fondren and the Estate of W. W. Fondren, deceased, Ella F. Fondren, Independent Executrix, for a review of decisions of The Tax Court of the United States, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decisions of the said Tax Court of the United States in this cause be, and the same are hereby, affirmed.

“Waller, Circuit Judge, dissents.”

[fol. 83]

No. 10829

[fol. 83] IN THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

No. 10829

ELLA F. FONDREN and the Estate of W. W. FONDREN, De-  
ceased, ELLA F. FONDREN, Independent Executrix, Peti-  
tioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

### MOTION FOR STAY OF MANDATE

To the Honorable Circuit Court of Appeals for the Fifth  
Circuit:

Now come Petitioners, Ella F. Fondren, and the Estate  
of W. W. Fondren, Deceased, Ella F. Fondren, Independ-  
ent Executrix, and pray the Court that it grant Petitioners  
a stay of the Mandate to issue from this Court to the Hon-  
orable The Tax Court of the United States in above styled  
and numbered cause pending the filing by Petitioners of  
their Application to the Supreme Court of the United  
States for Writ of Certiorari therein. Petitioners pray  
that such stay of Mandate be granted for a period of thirty  
(30) days from and after March 24, 1944 which date is the  
21st day after rendition and entry of judgment therein by  
this Court.

Ella F. Fondren, and Estate of W. W. Fondren, De-  
ceased, Ella F. Fondren, Independent Executrix,  
by W. M. Cleaves, Attorney, Petitioners.

STATE OF TEXAS.

County of Harris:

On this day personally appeared before me, the under-  
signed authority, W. M. Cleaves, attorney who signed above  
Motion, and on oath did depose and say that before submit-  
ting same to the Court a true copy thereof was mailed by  
registered mail to the Honorable Mr. J. P. Wenchel, Chief  
Counsel, Bureau of Internal Revenue, Washington 25, D. C.

Certified under my hand and seal of office this 18th day  
of March, 1944.

W. S. Cleaves, Notary Public in and for Harris  
County, Texas. (Seal.)

[fol. 84] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
FIFTH CIRCUIT

No. 10829

ELLA F. FONDREN and the ESTATE OF W. W. FONDREN, de-  
ceased, ELLA F. FONDREN, Independent Executrix, Peti-  
tioners,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

On consideration of the application of the Petitioners in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Petitioners to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 22nd day of March, 1944.

(Signed) E. R. Holmes, United States Circuit Judge

[fol. 85] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

